



October 25, 1999

Mr. Edward H. Perry
Assistant City Attorney
City of Dallas
City Hall
Dallas, Texas 75201

OR99-3019

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 127554.

The City of Dallas (the “city”) received a request for all responses to request for proposal RFCSP B998038. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code.¹ You indicate that release of the responsive information implicates the property rights of third parties. You have submitted a representative sample of the responsive information.² We have considered the exceptions you claim and reviewed the submitted information.

¹You also raise sections 552.104 and 552.105, but as you provide no comments in support of those exceptions, they shall not be addressed.

²We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office. We note that the city has been asked to compile certain information. The Public Information Act does not require a governmental body to obtain information not in its possession or to prepare new information in response to an open records request. Open Records Decision No. 445 (1986). Therefore, if the city did not have a compilation of the requested information at the time of the request, it need not produce one in response to this request.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This provision excepts from disclosure information that implicates the privacy rights of individuals. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). However, privacy rights do not protect business interests. Open Records Decision No. 192 at 4 (1978) (right of privacy protects feelings of human beings, not property, business or other monetary interests); *see* Open Records Decision No. 373 at 3 (1983) (privacy interest in financial information relating to individual). As all of the implicated third parties are business entities, the subject information is not protected by a right of privacy and none of the information may be withheld under section 552.101. Business interests may be protected under Section 552.110 of the Government Code.

Government Code section 552.305 permits third parties to submit to the attorney general their reasons why requested information should not be released. Pursuant to this section, this office informed the parties whose interests are implicated by release of the information of the request and provided them an opportunity to claim the exceptions to disclosure any may contend applies to the requested information, together with argument in support of those exceptions. *See* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Government Code section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions in certain circumstances). The notifications stated that if the respective company did not respond on or before October 8, 1999, this office will assume that the company has no privacy or property interest in the requested information. We note that the city also notified each of these parties of the request for information.

Storage Technology Corporation, EMC Corporation, and Amdahl Corporation did not respond. As we have no basis for determining that the responsive information received by the city from these firms is excepted from disclosure, all such information must be released.

Representatives of INRANGE Technologies Corporation ("INRANGE") responded, asserting that all information obtained from that company in response to the subject bid is excepted from disclosure by Government Code section 552.110. Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a

chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management

Restatement of Torts § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

The following criteria determines if information constitutes a trade secret:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, *supra*; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

This office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if sufficient facts to establish a *prima facie* case that the information is a trade secret are alleged and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 at 5 (1990).

INRANGE alleges that its pricing information is not known outside the company except to recipients of specific bids and that those recipients agree to nondisclosure as a condition of receiving the information.³ They also allege that the company has foregone business opportunities that would potentially compromise the secrecy of this information. They further allege that the price information is restricted to specific employees and is not generally known within the company. Further, they assert that measures are taken so that price information is not electronically available. INRANGE alleges that disclosure of the

³Governmental bodies may not enter into agreements to keep information confidential except where specifically authorized to do so by statute. Open Records Decision No. 444 (1986).

price information would undermine the profitability and competitiveness of the firm by allowing competitors to underbid INRANGE proposals or by forcing INRANGE to lower its sales prices. INRANGE asserts that the subject prices were arrived at through market analysis conducted at considerable expense, and that this price information would be extremely difficult to duplicate or acquire. We conclude that INRANGE has alleged sufficient facts to establish a *prima facie* case that the responsive price information obtained from this company is protected as a trade secret under section 552.110 of the Government Code. The price information obtained from INRANGE must therefore be withheld under the "trade secret" aspect of section 552.110 of the government Code. As INRANGE has not alleged sufficient facts related to the balance of the information submitted by INRANGE we conclude that it is not protected by section 552.110 as a trade secret.

Our offices have previously held that information could be withheld under the "commercial or financial information" aspect of section 552.110 if it is likely either to (1) impair the government's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the information was obtained, applying the test articulated in *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir 1974). However, this rationale was expressly rejected by the Third Court of Appeals, which recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App. -- Austin 1999, pet. filed). As no statute or judicial decision has been shown to expressly hold the subject information to be privileged or confidential, no information may be withheld under the commercial or financial information prong of section 552.110.

In summary, the price information submitted by INRANGE must be withheld, and the balance of the responsive information released. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/nc

Ref: ID# 127554

Encl. Submitted documents

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